

PROCEEDINGS OF THE CITY PLANNING COMMISSION

February 3, 2017

Regular Meeting

A regular meeting of the City Planning Commission was held this day at 9 A.M. in the J. Martin Griesel Room of Two Centennial Plaza with the following members present: Chair Daniel Driehaus, Mr. John Schneider, City Manager Harry Black, and Dr. Rainer vom Hofe. Councilmember Amy Murray, Mr. Ronald Koettters, and Mr. Byron Stallworth were absent.

Also in attendance were Mr. Marion Haynes, legal counsel, and Department of City Planning staff: Mr. Charles C. Graves III, Mr. Steve Briggs, Ms. Stacey Hoffman, Mr. Alex Peppers, Ms. Katherine Keough-Jurs, Ms. Lauren Bihl, and Ms. Hannah Urbanski.

Mr. Driehaus called the meeting to order and asked everyone to join in the Pledge of Allegiance.

The Commission approved the last two prior meeting's minutes (December 16, 2016 and January 20, 2017).

Mr. vom Hofe made the motion, which Mr. Schneider seconded.

Aye: Mr. vom Hofe, Mr. Black, Mr. Schneider, and Mr. Driehaus.

Discussion Agenda – Legislative

Mr. Briggs presented **Item 1** which was a report and recommendation on the sale of Campbell Street and Freeport Alley within Planned Development #76 (PD-76) in Over-the-Rhine. Department of City Planning staff recommended approval.

Mr. Driehaus stated that there were 3 speaker cards submitted in support of the developer as well as 4 speaker cards submitted in opposition. He then called Mr. Tim Burke, the legal representation for the developer, to the microphone.

Mr. Burke introduced Mr. Michael Heekin to speak on behalf of the developer, as well as request that after the opposition has had the opportunity to speak that if necessary they would have the ability to respond.

Mr. Heekin gave a brief description of the project located at Liberty and Elm for Source 3 Development. He stated that around October of 2015 they met with the City's Department of Transportation and Engineering (DOTE) to talk about the alley. The original site design did not preserve the alley due to a more efficient building design, however, after meeting with the

community and talking to the City more, it was clear that they needed to save the alley. He stated that to the community's credit, it would be a great asset to the community and to the project itself. Mr. Heekin referenced Campbell Street's dead end and declared that to be the proposed entrance to a future garage which would remain a surface lot in the first phase of the project and a garage in the second phase. He stated that the developer had been going through all the City entitlements and it was known from the beginning that acquiring Campbell Street would be essential to this project. The developer felt Campbell Street would be a great asset to build the garage and maintaining Freeport Alley would be a great asset to the amenities of the building and the neighborhood.

Mr. Driehaus thanked Mr. Burke and Mr. Heekin and stated that they would be called back up after the others testified. He then invited Mr. Danny Klingler to the microphone.

Mr. Klingler introduced himself as a resident of 225 Magnolia Street in Over-the-Rhine as well as a board member of the Over-the-Rhine Foundation. He stated that he was there representing the joint committee of the Foundation and the Over-the-Rhine Community Council. The Community Council had appealed the PD-76 decision and felt that it was pre-mature to make a decision on the disposition of these public rights-of-way until the appeal matters had been resolved. With the Community Council being opposed to the project as it currently stands, they felt that with such a matter as the permanent transfer of these rights-of-way, they would like to know whether or not the project would be moving forward first. Secondly, Mr. Klingler then addressed the issue of the project changing multiple times, and referred to the fact that the addition of a parking garage was what catalyzed the need for them to acquire Campbell and Freeport, yet now the garage would remain a surface parking lot for the first phase of the project with no promise of a garage. He emphasized that the City would have no control after permanently transferring these public assets, and would be doing so without an appeal decision and without the promise of any development ever occurring at this site. He stated that a surface lot would not require the alley or street to be in existence and that by transferring these rights-of-way to the developer, they were jeopardizing the historic integrity of the alley. On behalf of the Over-the-Rhine Community Council and the Over-the-Rhine Foundation, he asked that this decision be deferred until after the appeal has been resolved so that Planning Commission could consider all of the available factors.

Mr. Schneider stated that after looking at the site plan, he believes that it should be possible for the developer to preserve the alley whether the project includes a surface lot or a parking garage. He also stated that if the Community Council was concerned about the garage not being guaranteed, they should be willing to facilitate the developer's ability to do so.

Mr. Klingler thanked Mr. Schneider for the comment, and responded that the community was not concerned about the garage but rather the project as a whole. The garage was just one more way in which the community's trust in the developer had been taken for granted and there were other serious issues that were laid out many months ago that went beyond the scope of the garage that

had not been addressed yet. He stated that their concern was not with trying to make a garage happen but with making sure that the community would be able to have a voice in the development of this project.

Mr. Schneider asked Mr. Marion Haynes if this project went to the Zoning Board of Appeals and the Board ruled against the developer's plan after the City had already conveyed the land of Campbell Street and Freeport Alley to them, what would become of the project after that.

Mr. Haynes stated that he was unsure of the real estate transaction details and the kind of restrictions the City may have placed on that agreement. He said that generally when the City executed development agreements it typically retained some right of reversion if the development that was proposed by the contractor was not carried out, then the City had the right to claw the land back. He would expect that to be the scenario in this particular case as well, meaning that if the development was not fulfilled for any reason, the City then had the right to claw back the land.

Mr. Schneider asked Mr. Haynes if the City Planning Commission would have to address that right of reversion in their decision or if it would happen automatically.

Mr. Haynes said that he could not determine whether it would or would not happen automatically.

Mr. Black recommended that when the City Planning Commission took action on **Item 1**, they should be sure to incorporate some reversion language into the motion.

Mr. Jules Rosen, board member of Spring in Our Steps, which is an organization advocating for alleyways and staircases in the City, stated that their organization appreciated the preservation of Freeport Alley, but was opposed to the privatization of both Freeport Alley and Campbell Street. He suggested that if this project move forward, that the developer use gravel for the surface parking lot, versus the more permanent and expensive choice of asphalt, which could condemn the space to being a surface lot indefinitely.

Ms. Margy Waller introduced herself as a resident at 219 Magnolia Street in Over-the-Rhine. She stated that many other residents had put in hundreds of hours in an attempt to bring the project to a place where it fit the community plans and goal, but it still did not. She urged the City Planning Commission to delay any kind of decision until their concerns had been resolved with the Zoning Board of Appeals, and if no delay were possible, then they ask that some kind of claw back language be incorporated into the motion. She suggested the requirement of a parking garage, with a claw back if the garage is never built. She said that one of the community's biggest concerns was the fact that the developer explicitly stated they may never actually build a garage if they could not find the financing for it. Ms. Waller stated that after observing the large amount of community opposition to this project, the City should look further into the developer's ability to finance this

project overall. She encouraged the City to consider other arrangements that would allow for the development of this project that may not require the sale of the City-owned property. She cited the owners of the Dennison Hotel who were able to park on and use an adjacent City-owned alleyway. Ms. Waller then asked that in the event of the sale of the alley, if it would be open or gated.

Mr. Burke stated that the developer had anticipated there would be a claw back provision within the final arrangement. He also stated that the developer was acquiring Freeport Alley through an easement, not a sale, and that it would be open with bollards, not gated.

Mr. Schneider stated, in reference to the idea of a gravel lot, that the City would not allow for a gravel lot for a project of this size and also that it would most likely not be financed if it included a gravel lot. He then referenced his years of experience dealing with the difficulties of plowing snow and maintaining gravel lots.

The Commission adopted staff's recommendations for Item 1 on the Legislative Discussion Agenda provided that Campbell Street and Freeport Alley be reverted back to the city in the event the project is not completed as planned.

Mr. Schneider made the motion, which Mr. Black seconded.

Aye: Mr. vom Hofe, Mr. Black, Mr. Schneider, and Mr. Driehaus.

Other Business

Mr. Matthew Shad, Zoning Administrator in the Department of Buildings & Inspections, provided an update on 125 and 77 W. McMillan Street in the CUF neighborhood. He stated that they had provided the Commission with a timeline for both projects, but had primarily been focusing on 125 W. McMillan Street due to that property containing the largest challenge.

Mr. Driehaus stated that his main focus had been on 77 W. McMillan Street due to its clearly visible violations. However, he also stated that Mr. Schneider and a few others were more familiar with 125 so it would be beneficial for Mr. Shad to elaborate on both projects to the extent possible.

Mr. Shad stated that their office and the developer had spent most of their energies on 125, and the timeline illustrated a number of unexpected consequences in the redevelopment of this site, namely related to sewer access or lack thereof. Because ground work needed to be completed before surface work, this had pushed back the entire process. He stated that the owner of 125 W. McMillan had been meticulous in communicating with the Department of Buildings & Inspections and they were fully aware of his progress with the project. Regarding 77 W. McMillan, Mr. Shad stated that because the owners were moving towards compliance with the permit, although he recognized it had not be fulfilled prior to that meeting, they were beginning to slow down on

enforcement. Again, he stated that their office had been spending most of its energies on 125 W. McMillan Street.

Mr. Driehaus referenced prior meetings concerning these projects and noted that there was already a \$5,000 fine brought to the table when the owner had torn down a garage before filing the correct paperwork and receiving approval from the City. He stated that the fine being paid was important to the City Planning Commission because it demonstrated that there was an opportunity for cooperation. In his opinion, he felt that it was obvious that there was no intent to cooperate with the City. He stated that when the Department of City Planning and the owner had come to an agreement on extending the front porch to cover the front lawn, which was currently cement, the Commission had faith that he would do so. He then stated that that was 5 months ago and nothing had happened; the cars were still parked on the front lawn, which was still cement. Mr. Driehaus recognized that while it was not part of the Commission's job to enforce Code, he did recall that at the last meeting about 20 community members attended and encouraged them to do so, and it was necessary for the Commission to listen to them. He stated that he was furious, and found it outrageous that the owner was blatantly violating what the Department of City Planning agreed to and what the Commission approved, even though the community was not happy about the decision made at the time. He stated that it has been 5 months since the owner had been out of compliance and asked Mr. Haynes and Mr. Shad to review what kind of fines were applicable at this point. Mr. Shad said that they had the ability to do fining on a daily violation circumstance. He referenced the memo, stating that they had issued a one-day violation fee of \$250. Mr. Driehaus asked what opportunity the City had to fine retro-actively. Mr. Shad responded that he would have to defer to the Law Department.

Mr. Driehaus asked Mr. Shad if he knew what the timeline looked like for the owner to come into compliance. Mr. Shad responded that the owner's representative was present to talk about their strategy.

Mr. Driehaus asked the owner's representative to submit a speaker card and come to the microphone.

Mr. Schneider asked if at 125 W. McMillan Street there was no sewer tap at all or if there was no sewer tap that was large enough to serve the surface parking lot. Mr. Shad responded there was an expectation that there was an existing sewer tap that had been closed and would have been adequate to serve the surface lot. The Metropolitan Sewer District of Greater Cincinnati (MSD) conveyed to the owner that the tap existed, therefore everyone designed to that assumption. The owner then had to wait several weeks for MSD to schedule the dig because they control the tapping process. He stated that during the dig they found that there was no sewer tap, which caused the dig to cease and also initiated discussions about new and existing tap policies. An existing tap is generally re-installed for free, whereas the installment of a new tap has a consequential cost of

several thousand dollars at the owner's expense. Mr. Shad stated that there are now several conversations concerning whose responsibility it was to know that the tap was not there as well as who would be taking on the financial responsibility of the task. He stated that all of these factors had contributed to the extended lapse of time of this project.

Mr. Schneider commented on the fact that if MSD did show the sewer tap on the maps provided, then the developer would have a reasonable expectation for the tap to exist. He then mentioned that he had experienced similar situations himself where he expected a tap to exist based on MSD drawings and found after digging that it did not.

Mr. Shad stated that it's not just about the location of the tap, but also whether the tap existed or not because the term "exist" comes with a financial consequence.

Mr. Driehaus began to elaborate on the timing of the process and started off by stating that on the 4th of January 2017, MSD rendered a legal opinion on who was liable for the cost and construction of the new tap. He then asked what the time frame was for this issue to be resolved. Mr. Shad responded saying that the owner had continuing conversations with the City to talk about where they stood at the time.

Mr. Driehaus asked Mr. Schneider, as someone who has dealt with similar delays on projects, if this was a situation that the developer should have considered or if it was just another delay tactic.

Mr. Black referred to the fact that the owners had come to talk to him concerning this item. He stated that he discovered within MSD paperwork there was a disclaimer for this very purpose which protected the agency and generated a whole different kind of conversation.

Mr. Matt Walla, representative for 125 W. McMillan Street and 77 W. McMillan Street, stated that he understood how serious the concerns about 125 and 77 W. McMillan Street were and how quickly everyone would like it to be resolved. He stated that they had completed the inspection process for as much as possible at this stage in the project. For 125 W. McMillan, of the three catch basins the plan called for, two have been installed and inspected as well as the three foot buffer required around the lot. He stated that the plan called for the parking payment kiosk to be moved back onto their property, which had also been done. He said he hoped that these things being done could show that they were committed to moving forward as quickly as possible. He stated that their engineer had been working with drawings from MSD which showed a tap for the third catch basin. When they found that there was no existing tap, their plumbing company, began working with Rob Kern from MSD who suggested that they dig where they think the pipe existed and if found, MSD would install it, and if not it would become the owner's responsibility. He stated that as he was speaking before them they were digging to look for the pipe and what they found on that

day would determine how they would proceed. He apologized for the delay and expressed that it was due to them trying to determine MSD regulations.

Mr. Driehaus stated that the best thing he had going for him at the time was that Mr. Shad had just testified that he was in communication with them and that he was talking to the administration. He stated that their credibility was the lowest of anybody he had seen in the last two years as a member of the City Planning Commission.

Mr. Schneider asked to clarify that the owner was digging on their own property to determine if there are remnants of a pipe there in order to establish a case where there was an existing pipe and the City removed it. He asked if that was what they were trying to establish by digging on their property.

Mr. Walla responded that there was an existing trench drain there and their thoughts were that it had to have connected somewhere. The owner was hesitant to say that the tap was never there because they believed the trench drain pipe had to spout water off somewhere and MSD drawings showed a connection, so they were digging to determine whether or not that was true. He stated that if they did not find evidence of an existing tap that day, then it would become the owner's responsibility and they would be moving forward with the project. He also added that if that were to be the case, they would have to file for a street closure permit, dig up the street, install the tap, and then repave the street, which could be a very long process, but they would be working to get the work done as quickly as possible.

Mr. Driehaus asked Mr. Walla to remind everyone of his background with projects such as this. Mr. Walla said that he was coordinating the project on behalf of the owner.

Mr. Driehaus asked for Mr. Walla's experience in project management. Mr. Walla said that he did not have a construction background.

Mr. Driehaus asked to discuss 77 W. McMillan Street and what the action steps had been in the last 5 months and what his intentions were at the time. Mr. Walla said that the problem was the front yard parking, so the plan was to extend the deck to prevent that in the future.

Mr. Driehaus asked Mr. Walla to elaborate on what he meant by the problem being the front yard parking. Mr. Walla said the reason the owner proposed to build the deck was to eliminate the possibility of the front yard parking. He stated that they submitted the permit and got approval, however, they admittedly made 77 W. McMillan Street their second priority behind 125 W. McMillan Street. He stated it was brought back to their attention last week that it was still a violation and they received a fine.

Mr. Driehaus asked if last week was the first they had heard that it was out of compliance. He asked if there was any ambiguity about being out of compliance when the Commission voted on it in October of 2016.

Mr. Walla stated that it was clear. He stated that since then they had paid for and picked up a permit and set a plan for themselves to try and eliminate tenants from parking there until the construction was complete. He said that the \$750 fine should already be paid and if not would be paid that day. He said that he recognized the need to take some serious action steps in order to make this happen.

Mr. Driehaus stated that the tenants were not allowed to park there and then asked if any of the owners or himself park in those spaces. Mr. Walla responded that they park at 125 W. McMillan Street.

Mr. Driehaus asked Mr. Walla if he recalled the day in December that he had spoken with him on the front lawn and the owner's car was on the front lawn. Mr. Walla responded yes.

Mr. Driehaus asked if Mr. Walla knew he was out of compliance that day and every day since then when a car parked on the front lawn of that property. He stated that this was not a new subject. He said that the question now was how to address fines and asked Mr. Shad if there were \$750 in fines charged for 77 W. McMillan Street.

At 9:40 A.M. Mr. Schneider left the meeting.

Mr. Shad stated that he was under the impression that they issued a fine of \$250.

Mr. Driehaus asked Mr. Shad what opportunities there were for retroactive fines for the owners being out of compliance.

Mr. Shad stated that he would have to ask the Law Department. He stated that the Department's main concern was that both sides were working together, and that they had not pursued any kind of enforcement because of the permitting movement. He described their enforcement process as gradual where they give owners a chance, a second chance, and then they start the fines

Mr. Driehaus asked Mr. Haynes what the opportunities for retroactive fines were.

Mr. Haynes declared that he did not know the answer to this question. He stated that generally the City could not pass retroactive laws, but just like crimes wherein if it can be proved that someone had violated the law at an earlier date, they could then be charged with that crime. He said that he did not have the answer, but the City had the ability to fine on a daily basis any violations of the Building and Zoning Codes which was \$750 a day for the Building Code and \$1,250 for the

Zoning Code. Violations of the Zoning Code can be cited as criminal misdemeanors and under the Building Code, accessories to a violation may be charged including owners, architects, project managers, or anyone who was involved in avoiding compliance with the Building Code. Mr. Haynes stated that the City also had the ability to seek an injunction through litigation that would normally start with a cease work order or a stop order. The City could issue orders to prevent parking on either of the properties which could impact the revenue stream for the owner. The City could also seek an injunction if it did not get a response to those orders, which could stop the uses of those properties before they are actually permitted, inspected, and allowed to move forward.

Mr. Shad stated that to be clear, the Department of Buildings & Inspections had an open citation on the parking issue of 77 W. McMillan. He stated that when they applied for the permit it was an action step towards compliance, which ceased punitive action.

Mr. Driehaus stated that in the past ten minutes they had lost quorum so there would be no opportunity to act on anything, however, he hoped that the comments made at the meeting were important. He referenced the many people who had been outraged about this situation, whose comments were heard at the hearing in October, between October and the present meeting, as well as months to come. He stated that he hoped the City would enforce the fines immediately, would endeavor to retroactively fine the owners, and that he would like to see progress by the next meeting in two weeks. He stated that without quorum there was nothing they could do at the time and asked for any further questions from anyone

Director's Report

Mr. Graves recognized the students from the University of Cincinnati who were in attendance of the meeting and asked them to introduce themselves, stating where they were from and why they chose to study planning in Cincinnati.

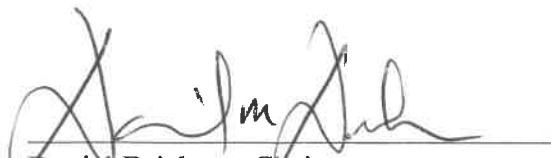
The meeting adjourned at 9:54 A.M.



Charles C. Graves, III, Director
Department of City Planning

Date:

2/17/17



Daniel Driehaus, Chair
City Planning Commission

Date:

2/17/17